Supreme Court, U. S.
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In The

SUPREME COURT of the UNITED STATES

October Term, 1974

No. 74-70

LOUIS H. GOLDFARB and
RUTH S. GOLDFARB,

Petitioners,

v.

VIRGINIA STATE BAR and FAIRFAX
COUNTY BAR ASSOCIATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS, FOURTH CIRCUIT

BRIEF AND APPENDIX OF THE STATE BAR OF WISCONSIN AS AMICUS CURIAE

For the State Bar of Wisconsin

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Letters from attorneys for all parties consenting to the filing of this brief are on file with the clerk.

OPINION BELOW

The opinion of the United States Court of Appeals, Fourth Circuit, is reported in 497 Fed. (2) 1.

QUESTION PRESENTED

Does the Sherman Anti-Trust Act apply to an integrated State Bar fee schedule or to the fee schedules of voluntary bar associations?

INTEREST OF THE STATE BAR OF WISCONSIN AS AMICUS CURIAE

The State Bar of Wisconsin like the Virginia State Bar is an integrated bar although created by state action pursuant to order of the Supreme Court of Wisconsin acting under its inherent power rather than by legislative act as in Virginia. See *Lathrop v. Donahue* (1961) 367 U. S. 820, for the history and structure of the State Bar of Wisconsin, and its validity.

Unlike the Virginia State Bar the State Bar of Wisconsin does not now have and does not propose to adopt any fee schedule either compulsory or voluntary relating to the general practice of law. However, the State Bar of Wisconsin is very deeply concerned with the adverse effect of a possible reversal of the decision of the United States Court of Appeals for the Fourth Circuit in that a holding to the effect that a State Bar is subject to the price fixing provisions of the Sherman Anti-trust Act would seriously jeopardize the efforts of the State of Wisconsin in discharging the duty of the profession to deliver adequate legal services to the public at reasonable rates through the medium of Group and Prepaid Legal Service plans providing a schedule of benefits and fees.

While the State Bar of Wisconsin has no immediate interest in that part of the decision below relating to fee schedules of voluntary bar associations such as the Fairfax County Bar Association here, it does strongly subscribe to the holding of the lower court that the practice of a learned profession such as the law is neither trade or commenrce and that restraints upon such practice are not per se violative of the Sherman Act. However, this

brief will not be addressed to that subject but will be confined to that part of the decision relating to State Bar fee schedules and how the reversal of the lower court decision will destroy the professional duty of the bar to provide services to the public at reasonable rates through Group and Prepaid Legal Service plans such as are contemplated by the State Bar of Wisconsin pursuant to rules of the Supreme Court of Wisconsin promulgated on November 29, 1972, effective December 7, 1972, published in 55 Wis. (2) xi-xiii, a copy of which is set forth in this brief as Appendix A, and as implemented by Minimum Standards for Group and Prepaid Legal Service Plans adopted by the Board of Governors of the State Bar of Wisconsin on September 21, 1973, a copy of said standards being attached to this brief as Appendix B.

SUMMARY OF ARGUMENT

The State Bar of Wisconsin takes the position that the judgment of the United States Court of Appeals, Fourth Circuit, should be affirmed because:

1. There is nothing in the Sherman Act which requires it to be so interpreted as to deprive the public of the right to receive legal services under a state plan promoting the delivery of legal services at the lowest possible cost in accordanc with pre-arranged schedules of benefits and costs.

2. The United States Supreme Court has indicated its approval of attorney fee fixing for legal services at reasonable rates to organized public interest groups.

3. The public as well as the legal profession has the right to know the customary fee charged for legal services.

ARGUMENT

I.

THERE IS NOTHING IN THE SHERMAN ACT WHICH REQUIRES IT TO BE INTERPRETED IN SUCH A WAY AS TO DEPRIVE THE PUBLIC OF THE RIGHT TO RECEIVE LEGAL SERVICES UNDER ANY STATE PLAN WHICH WILL PERMIT THE LEGAL PROFESSION TO DELIVER SUCH SERVICES AT THE LOWEST POSSIBLE COST IN ACCORDANCE WITH PREARRANGED SCHEDULES OF BENEFITS AND COSTS

As indicated above the interest of the State Bar of Wisconsin in this appeal arises out of its concern that if the decision of the Fourth Circuit is reversed and the Sherman Act is held to be applicable to the fee schedules of an integrated bar the result could place in grave jeopardy any program promoted by the profession and the courts such as Group or Prepaid Legal Service plans providing a schedule of prearranged benefits and fees.

That such a fear is not an idle one is amply demonstrated by the fact that representatives of the Anti-Trust Division of the United States Department of Justice have publicly announced not just once but a number of times their determination of prosecuting bar associations whose Group and Prepaid Legal Service plans do not meet with their approval in one way or another.

It is unnecessary to go into the details here but the controversy is set forth at some length in articles in the American Bar Association Journal, such as the following:

1. "Justice Department and Other Views on Prepaid Legal Services Plans Get an Airing before the Tunney Subcommittee", July, 1974, Vol. 60, p. 791 and ff.

2. "Justice Department Continues Its Contentions that the Houston Amendments Raise Serious Anti-Trust Problems", November, 1974, Vol. 60, p. 1410 and ff.

3. "The Prepaid Legal Service Picture", December, 1974, Vol. 60, p. 1545.

Also as appears in the November, 1974, issue of the American Bar Association Journal at page 1411, the Justice Department has filed a number of suits against various professional organizations including a challenge to the use of minimum and suggested fee schedules by the Oregon State Bar.

The Justice Department has proposed to draw distinctions betwen so-called "open" and "closed" plans of delivery of legal services to the public. Who knows what distinctions they may attempt to enforce upon the legal profession tomorrow?

The inherent power and responsibility for the regulation of the practice of law belongs to the judicial rather than to the legislative department of government.

In re Cannon (1932) 206 Wis. 374, 240 NW 441

Integration of Bar Cases

(1943) 244 Wis. 8, 11 NW (2) 604

(1946) 249 Wis. 523, 25 NW (2) 500

(1956) 273 Wis. 281, 77 NW (2) 604

(1958) 5 Wis. (2) 618, 93 NW (2) 601

Lathrop v. Donahue (1960) 10 Wis. (2) 230, 102 NW (2) 404, affirmed 367 U. S. 820

State ex rel. Reynolds v. Dinger (1961) 14 Wis. (2) 193, 109 NW (2) 685

State ex rel. State Bar v. Keller (1961) 16 Wis. (2) 377, 114 NW (2) 685, 21 Wis. (2) 100, 123 NW (2) 905, cert. denied 377 U. S. 964

State ex rel. State Bar v. Bonded Collectors (1967) 36 Wis. 2) 643, 154 NW (2) 250, 27 ALR (3) 1138

State ex rel. Baker v. County Court (1965) 29 Wis. (2) 1, 138 NW (2) 162, 19 ALR (3) 1089

This is a point that cannot be stressed too strongly. It is true as was said in the case of *In re Greathouse* (1933) 189 Minn. 51, 248 NW 735, 737, that the judicial power of the courts has its origin in the constitution, but when a court comes into existence, it comes with inherent powers.

The three great departments of government being made separate and independent of one another precludes the idea that the legislative department may embarrass the judiciary by regulating the practice of law and such an intent should not be inferred in the absence of express constitutional provision.

In re Cannon (1932) 206 Wis. 374, 397, 240 NW 441

As was said in this case at page 379:

"We do not fail to appreciate the delicacy in considering a disputed question involving legislative and

judicial power. We easily subject ourselves to the criticism of usurping power where by our decision the power is committed to the judicial rather than the legislative department of government. However, we may as easily subject ourselves to the criticism of timidity were we to betray a disposition to avoid responsibility. The usurpation of power is not more culpable than the abdication of responsibility."

A reversal of the decsion of the Fourth Circuit here so as to place the subject of fees for the professional services of lawyers under the aegis of the Anti-Trust Division of the Justice Department is the invitation to the dance so far as surrender of the regulation of law to a vast federal bureaucracy is concerned.

As the lower court so ably pointed out in quoting at page 19 from *Unted States v. Cooper Corporation* (1941) 312 U. S. 600, 606, it is not for the courts to indulge in the business of policy-making in the field of anti-trust legislation, and that in effect the Goldfarbs are urging the court to indulge in judicial legislation.

II.

THE UNITED STATES SUPREME COURT HAS IMPLIEDLY GIVEN ITS APPROVAL TO ATTORNEY FEE FIXING

While the case of *United Transportation Union v. State Bar of Michigan* (1971) 401 U. S. 576 was not an anti-trust case, it is nevertheless very significant from the standpoint of its implications here.

The Michigan State Bar sought to enjoin the members of a railroad union from solicitation of personal injury litigation in cases where attorneys had agreed on maximum 25% attorney fees. The stated purpose of the union was to assist their fellow workers, their widows and families, to protect themselves from excessive fees at the hands of incompetent attorneys in suits for damages under the Federal Employers' Liability Act.

The question of the propriety of a fixed reasonable attorney's fee appears to have carried considerable weight as is evidenced by the following language from the majority opinion at page 585:

> ". . . It is hard to believe that a court of justice would deny a cooperative union of workers the right to protect its injured members, and their widows and children, from the injustice of excessive fees at the hands of inadequate counsel. . . ."

Thus, the principle of an agreement fixing attorney fees was accepted by the court as well as by counsel. It is indeed difficult to believe that the applicability of the Sherman Act to such fee fixing would have been entirely

overlooked by the court and the contesting parties if, in fact, there is any substance to the suggestion that lawyers involved in widespread fee fixing agreements are violating the Sherman Act.

III.

THE PUBLIC AS WELL AS THE LEGAL PROFESSION HAS A RIGHT TO KNOW THE CUSTOMARY FEE CHARGED FOR DELIVERY OF LEGAL SERVICES

Under Canon 2 of the Code of Professional Responsibility, DR 2-106 (B) (3) of the American Bar Association, one of the factors to be considered in determining the reasonableness of a fee is the fee customarily charged in the locality for similar legal services. This Code has been adopted by many state bars and is binding upon the members of the State Bar of Wisconsin by Supreme Court order. [43 Wis. (2) xiii-Lxxvi].

The customary fee standard is not only sanctioned by the Code of Professional Responsibility but it has also found its way into the statute law as in provisions allowing recovery of attorney fees in suits brought under Consumer Acts. For example, in consumer transaction litigation when the customer prevails under Sec. 425.308 (2) (b) Wis. Stats., it is provided that in determining the amount of the fee the court may consider among other things, "The customary charges of the bar for similar services."

How in the world is the public, the courts, and indeed the legal profession to know what the customary charges

of the bar are for similar services in the absence of a fee schedule?

Certainly the Sherman Act on its face is subject to no such construction as is urged by the Goldfarbs, and if by some process of tortured construction it is so interpreted, we then are led to the conclusion as stated in *United Transportation Union,* supra, page 581, that if a statute upon its face abridges rights guaranteed by the First Amendment, it should be struck down.

CONCLUSION

For the reason stated, the judgment of the United States Court of Appeals herein should be affirmed.

For the State Bar of Wisconsin

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APPENDIX A

August Term, 1972

STATE OF WISCONSIN — IN SUPREME COURT

In the matter of the Creation of a Rule for Registration of GROUP LEGAL SERVICES

Upon the petition of the State Bar of Wisconsin requesting this court to adopt a rule clarifying the rights and duties of attorneys involved in any form of group legal service arrangements and to require the registration of all such persons, a hearing was had and consideration given; and the court believing a rule should be created governing such matters, now therefore,

IT IS ORDERED that effective on publication of this order the rule known as section 256.294 of the statutes is created as follows:

"256.294 GROUP LEGAL SERVICES (1) The furnishing of legal services by a member of the State Bar pursuant to an arrangement for the provision of such services to the individual member of a group, as herein defined, at the request of such group, is not of itself in violation of the Rule of Professional Responsibility prohibiting solicitation and like activities if the arrangement:

(a) permits any member of the group to obtain legal services independently of the arrangement from any attorney of his choice, and

(b) is so administered and operated as to prevent all of the following:

1. Such group, its agents or any member thereof from interfering with or controlling the performance of the duties of such member of the State Bar to his client; and,

2. Such group, its agents or any member thereof from directly or indirectly deriving a profit from or receiving any part of the consideration paid to the member of the State Bar for the rendering of legal services thereunder; and,

3. All publicity and solicitation activities concerning the arrangement except by means of simple, dignified announcements setting forth the purposes and activities of the group, or the nature and extent of the legal services, or both.

(2) Nothing in this section shall prohibit a statement in response to individual inquires as to the identity of the member or members of the State Bar rendering or to render the services, giving the name or names, addresses and telephone numbers of such member or members.

(3) As used in this section, a "group" means a professional association, trade association, labor union or other non-profit organization, or combination of persons incorporated or otherwise whose primary purposes and activities are other than the rendering of legal services, and shall include groups furnishing legal services to indigent individuals on other than a fee basis.

(4) A member of the State Bar furnishing legal services pursuant to an arrangement shall advise the State Bar thereof within sixty days after entering into the same. Thereafter he shall register with and advise the State Bar, on forms provided by it, and within thirty days of receipt of such forms, of the following matters: the name of the group, its address, whether it is incorporated, its primary purposes and activities, the number of its members and a general description of the types of the legal services offered pursuant to the ar-

rangement. He shall annex to and include any fee schedule. Annually, on or before January 31, he shall report to the State Bar, on forms provided by it, the number of members in the group to whom legal services were rendered during the calendar year, and amendments to the plan, including changes in the fee schedule, during such preceding year.

All information filed pursuant hereto, except the name and address of the group, the fact that it has an arrangement for the provision of legal services and the names of members of the State Bar providing such services, shall be confidential; providing such registrations and reports shall be available to appropriate representatives of the supreme court and the State Bar for information purposes and for disciplinary and ethical investigations or proceedings.

(5) Failure to make and file a timely registration or report as to a group arrangement as required herein shall constitute unprofessional conduct and grounds for disciplinary action."

IT IS FURTHER ORDERED that notice of the adoption and promulgation of this rule be given by publication of this order in the official state paper and in the Wisconsin Bar Bulletin.

Dated at Madison, Wisconsin, this 29th day of November, 1972.

By the Court:

/s/ ARDIS KIRKPATRICK
Ardis Kirkpatrick
Deputy Clerk of Court

APPENDIX B

MINIMUM STANDARDS FOR GROUP AND PREPAID LEGAL SERVICE PLANS

The Board of Governors of the State Bar of Wisconsin on September 21, 1973, approved the following standards to be met by all plans through which attorneys furnish group or prepaid legal services in Wisconsin:

1. The entire plan shall be reduced to writing and a description of its terms shall be distributed to the members or beneficiaries thereof;

2. The plan and description shall:

(a) State clearly and in detail the benefits to be provided, exclusions therefrom and conditions thereto;

(b) Describe the extent of the undertaking to provide benefits and reveal such facts as will indicate the ability of the plan to meet the undertaking;

(c) Provide that there shall be no infringement upon the independent exercise of the professional judgment of any lawyer furnishing service under the plan;

(d) Specify that a lawyer providing legal service under the plan shall not be required to act in derogation of his professional responsibilities; and

(e) Set forth procedures for the objective review and resolution of disputes arising under the plan;

3. There shall be a periodic written report not less often than annually disclosing to members or beneficiaries of the plan and to the State Bar of Wisconsin

a summary of the operations of the plan including, but not limited to, all relevant financial data, the number of members or beneficaries receiving legal services, and the kinds of benefits provided;

4. Each plan should provide for an advisory group including members of the bar and beneficiaries of the plan which shall meet periodically to review and evaluate the organization and operation of the plan and to offer suggestions for its improvement.